



DEPARTMENT OF THE AIR FORCE

Headquarters Air Force Materiel Command
Wright-Patterson Air Force Base Ohio

64-10
24 Apr 01
FAR Part 45
Poc: Mary McGraw

MEMORANDUM FOR SEE DISTRIBUTION

24 April 24, 2001

FROM: HQ AFMC/SG

4225 Logistics Ave

Wright-Patterson AFB OH 45433-5760

HQ AFMC/PK

4375 Chidlaw Road, Room S208

Wright-Patterson AFB OH 45433-5006

SUBJECT: Eye Exams for Contractors Working with Lasers

Reference: HQ AFMC/PK Memo, 11 Mar 99, Government-Provided Occupational Health Support For Contractor Employees

1. Referenced memo addressed the issue of the government providing occupational health support to contractor employees working on base. An attached legal opinion concluded that (1) providing Occupational Health Support Act training could result in potentially unlimited government liability; and (2) providing the service in CONUS, where services are readily available, creates a possible Antideficiency Act (ADA) violation regarding proper use of Operations & Maintenance and Military Personnel Funds.
2. Recently, a question was asked about the government providing a specific type of health exam: eye exams for contractor personnel working with lasers. HQ AFMC/JA researched the applicable guidance and their advice remains unchanged. In view of the significant liability that could be incurred for performing eye examinations on contractor personnel, the government should not perform such examinations. The legal opinion is consistent with existing policy and is attached for your information.
3. Please direct any questions to our action officer, Ann Marie Telepak, HQ AFMC/PKPA, DSN 986-0378.

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GEORGE W. SEIGNIOUS, IV
Colonel, USAF BSC
Command Surgeon

MILTON C. ROSS, SES
Deputy Director of Contracting

Attachment:

HQ AFMC/JA Memo, 18 Jan 01

2001-11-B

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MEMORANDUM FOR AFMC/PKPA

18 Jan 2001

FROM: AFMC/JA

SUBJECT: Eye Exams for Contractors Working with Lasers

1. Overview. You requested our opinion whether Air Force personnel working at AF medical treatment facilities (MTFs) may provide eye examinations for contractor employees who work at the Air Force Research Laboratory. You indicated that occupational health and safety regulations require employees working with lasers to get a pre-work exam and a post-work exam. This office provided an opinion to AFMC/SGC on 12 Feb 98 advising against conducting OSHA training and physical examinations for contractor personnel. Upon review of additional regulatory guidance, we continue to advise against conducting such examinations.

2. Background.

A. Air Force Instruction 41-115, ¶ 1.10.1 and 1.10.1.5, entitled Authorized Health Care and Health Care Benefits in the Military Health Services System (MHSS) (25 July 1994) tells health care personnel how to determine eligibility for health care in Air Force dental and medical treatment facilities (MTF). That regulation states:

1.10.1. The Physical Exams Section (PES) provides pre-employment and other physicals when the MTF commander determines that MTF personnel are available and an official of the sponsoring agency sends a written request for the physical. There is no charge to the individual for the physical. The MTF commander may authorize the use of supplemental or cooperative care funds to cover the costs of these physicals. Individuals who may receive physicals under this paragraph are:

* * *

1.10.1.5. Civilian contractors working in positions that require exposure to occupational hazards such as laser energy an [sic] or toxic substances.

3. Department of Defense Instruction 6055.1, ¶ 2.5 (August 19, 1998) updates policies, procedures, and responsibilities for administering a comprehensive DoD safety and occupational health (SOH) program. The Instruction states:

2.5. This Instruction does not apply generally to DoD contractor personnel and contractor operations. Additional details are given in enclosure E5. In peacetime operations performed in the Continental United States or its territories or possessions, the contractor is responsible directly to Federal or State Occupational Safety and Health Administration (OSHA) for the safety of contractors' employees.

Enclosure E5, ¶ E5.1 states:

E5.1. DoD safety and health responsibilities in contractor plants and contractor operations on DoD property are generally limited to helping to ensure the safety of DoD-owned equipment; protection of the production base; protection of government property and on-site DoD personnel from accidental losses, and the protection of the public. The contractor is responsible for the safety and health of his or her employees and protection of the public at contractor plants and work sites.

* * *

E5.1.1.2. Components will ensure procedures are established to evaluate the benefit versus the legal and tort claims and compensation liability ramifications of acting as the controlling employer for a contract.

4. The provisions in AFI 41-115, ¶ 1.10.1.5 and DoD instruction 6055.1 appear to be inconsistent in certain respects. On the one hand, superior DoD guidance makes the contractor responsible for its employees while AF guidance runs the risk of assuming responsibility for contractor employees. There are at least three risks that must be evaluated in AF provided physical evaluations and/or training to contractor employees. First, the AF provided eye examination could be used in litigation to establish that the AF exercised oversight for contractor personnel. If AF oversight is established the AF would assume legal responsibility for the health and safety for the contractor personnel. Such a determination would unnecessarily subject the AF to legal liability for on-the-job injuries under the Federal Tort Claims Act. Second, the Air Force may incur liability under the privacy act based on ambiguities over creation and ownership (including improper disclosure) of resulting medical records. Third, the AF may subject itself to liability for malpractice under the Federal Tort Claims Act based on the performance of the eye examination. Contractor personnel receiving eye exams could allege the AF physician failed to diagnose condition unrelated to laser exposure, including, but not limited to, glaucoma, unrelated eye damage, or cancer. Any such allegation of malpractice, whether or not successful, would require costly efforts to defend against even unsupported allegations. Regardless of the basis for ensuing litigation, evidence from AF provided eye examinations might be seen as self-serving and therefore lacking credibility.

5. In an effort to resolve the apparent inconsistency between AFI 41-115 and DoD Instruction 6055.1, the undersigned reviewed AFI 48-123, January 1, 2000, entitled, "Medical Examinations and Standards." Chapter 17 is entitled "Occupational Health Examinations" and describes the purposes of preplacement (or baseline) examinations and termination examinations for Air Force employees. This section specifically references AFOSH Standard 161-10 (superceded by AFOH 48-10, which has been superceded by AFOHSTD 48-139) which requires examination upon termination and permanent change of station or permanent change of assignment from laser related duties. There is no mention in AFI 48-123 of occupational health examinations for contractor employees.

6. DoD Instruction 6055.5, January 10, 1989, entitled Industrial Hygiene and Occupational Health, amplifies the importance of preventing occupational illness and authorizes the publication of DoD 6055.5-M "Occupational Health Surveillance Manual," consistent with DoD Directive 5025.1-M, which recommends medical examinations and biological monitoring criteria for selected occupations. DoDI 6055.5, paragraph 2.3 specifically states that it does not apply to contractor personnel working on or operating DoD facilities.

7. AFOSHSTD 48-139 sets minimum requirements for establishing an AF Laser Radiation Protection program. Paragraph 2.5.2 requires pre and post employment medical examinations to be performed "only before an individual's initial assignment to laser duties and as soon as practical subsequent to actual termination of duties involving lasers (i.e., Permanent Change of Station or Permanent Change of Assignment, retirement, or separation)." There is no mention in AFOSHSTD 48-139 of eye examinations for contractor employees.

7. The undersigned also reviewed Air Force Handbook 41-114, entitled Military Health Services System (MHSS) Matrix, which is used to determine eligibility and appropriate charges for health care in AF medical treatment facilities (MTFs). Paragraphs 42 and Table 42 authorize care for contractors under certain conditions. It does not mention any authorization for physical examinations for contractors in USAF laser laboratories. The authority for treating contractors in USAF MTFs is listed as DODI 3020.37. That Instruction is entitled, "Continuation of Essential DoD Contractor Services During Crises." It does not relate to eye examinations for contractors working around lasers.

8. Conclusion. Following an extensive review of DoD guidance and AF guidance, the undersigned could not identify any underlying support for AFI 41-115's authorization for contractors to use AF MTFs for Air Force provided occupational health eye examination. There is an apparent inconsistency between AFI 41-115 and the DoD Instruction 6055.1, which excludes DoD contractor personnel from the DoD Safety and Occupational Health (SOH) program. No

other related AF guidance could be identified which supported authorizing AF MTFs to conduct occupational health eye examinations for contractor personnel. In view of the significant liability that could be incurred for performing eye examinations on contractor personnel, in our opinion such examinations should not be performed. If you have any questions, please contact the undersigned at DSN 787-5958 or Commercial (937) 257-5958.

//Signed//

Mark E. Landers
Attorney-Advisor
Acquisition Law Directorate